

STATE OF MICHIGAN
COURT OF APPEALS

SHELLEY ROZMIAREK,

Plaintiff/Counter-Defendant-
Appellee,

v

JOSEPH ROZMIAREK,

Defendant/Counter-Plaintiff-
Appellant.

UNPUBLISHED
July 26, 2016

No. 330980
Monroe Circuit Court
Family Division
LC No. 13-036428-DM

Before: JANSEN, P.J., and FORT HOOD and BOONSTRA, JJ.

PER CURIAM.

Defendant/counter-plaintiff (“defendant”) appeals by right the order of the trial court denying his motion to modify custody of the minor child. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Defendant and plaintiff/counter-defendant (“plaintiff”) were married in February 2013. Their minor child, GR, was born in March 2013. The parties divorced in July 2014. The judgment of divorce initially granted the parties joint legal custody of GR and granted sole physical custody to plaintiff. On October 8, 2014, the trial court entered a consent order modifying the judgment of divorce to provide that the parties “shall have joint physical care, custody and control of” GR and that the parties would have equal parenting time, with the parties generally alternating parenting time weekly except for holidays and vacations.

On April 9, 2015, defendant filed a motion to modify custody, parenting time, and child support. Defendant alleged that on September 20, 2014, plaintiff assaulted her 17-year-old daughter from a previous relationship, HM, while plaintiff was driving under the influence of morphine. Defendant further alleged that on October 16, 2014, Child Protective Services (CPS) found plaintiff guilty of abusing hydrocodone and morphine and of child abuse and neglect, removing GR from plaintiff’s home and placing her with her maternal grandfather. Defendant alleged that plaintiff was being investigated in connection with the September 20, 2014 incident for possible criminal charges of domestic violence and driving under the influence of a controlled substance, and that the case was awaiting a toxicology report. In addition, defendant

alleged that plaintiff was keeping animals in the house and smoking in GR's presence in contravention of a doctor's recommendations regarding the alleviation of GR's allergies. Defendant further asserted that plaintiff had allowed her new boyfriend to be in GR's presence in violation of a provision of the October 8, 2014 consent order that required a full background check and a six-month interval before exposing GR to a party's new romantic partner. Also, defendant claimed that plaintiff had missed 21 of the previous 27 scheduled doctor visits for GR since January 11, 2014. Defendant also asserted that plaintiff had failed to have GR wear a life jacket while on a boat. Finally, defendant contended that on January 5, 2015, GR had sustained burns to her hands while in plaintiff's care. Defendant argued that there had been a change of circumstances such that it was in GR's best interest for him to have sole legal and primary physical custody of GR, with plaintiff being allowed supervised parenting time.

The trial court held an evidentiary hearing on defendant's motion on July 10, 2015. After hearing testimony from defendant, plaintiff, and a Department of Health and Human Services (DHHS) employee, the trial court denied defendant's motion on the grounds that the facts underlying the majority of defendant's allegations, particularly with regard to plaintiff's alleged domestic violence toward HM and substance abuse, were known to defendant prior to the entry of the October 8, 2014 consent order. The trial court also found that the testimony concerning the remaining allegations did not rise to the level of proper cause or change in circumstances to revisit the issue of child custody. The trial court entered an order on August 3, 2015 denying defendant's motion to change custody, ordered that GR wear a life jacket on any watercraft, ordered the parties to follow a doctor's orders regarding the administration of medication, smoking, and pets, and ordered that neither party use any illicit drug or be under the influence of alcohol or drugs such that it affects the party's ability to parent GR.

On October 7, 2015, defendant filed another motion to modify custody, alleging that on July 31, 2015, plaintiff was charged in 33rd District Court with third-degree child abuse, a two-year felony, and that on August 11, 2015, plaintiff pleaded no contest to attempted third-degree child abuse, a one-year misdemeanor. The charge and the plea related to the September 20, 2014 incident with HM. On August 18, 2015, plaintiff received a delayed sentence, pursuant to MCL 771.1, of one year of probation, a requirement that she undergo three days of community service, a psychological evaluation, and a 26-week domestic violence program, and a prohibition on assaultive or intimidating behavior toward HM. If plaintiff complied, the case would be dismissed a year later. Defendant alleged that plaintiff's plea constituted an escalation and change of circumstances, and requested sole legal and physical custody of GR.

Following a December 16, 2015 hearing, the trial court denied defendant's motion, stating in relevant part:

I'm not appreciating how three days of community work service, a psychological evaluation, an injunctive [sic] about assaultive and intimidating behavior towards [HM], being on probation, attending a domestic violence program, and being under a diversion apparently, constitutes change of circumstance. They're all sorts of thing that have happened admittedly. I didn't hear – hear – I don't recall seeing a denial on that. But how does that change her ability to parent? How does that change [GR]'s life and surroundings?

* * *

Okay. Even if I accepted the facts on the face, as you've alleged Mr. Ferguson [defendant's counsel], and – and they don't seem to be disputed, I mean – I mean, it's clear. She – she plead[ed] no contest. She's – sentencing is being delayed. She's on the diversion program. All these things were – were admitted. So even if I accept them though, they do not cross the threshold for the Court to reconsider the custody order the parties have placed before me back in – on – on October 8, 2014, for the reasons that I said on July 10th of this year, and for the reasons that I eluded [sic] to in the – in my commentary in the order denying the ex parte motion to change custody.

There is nothing – there is nothing about these – these circumstances that put into question the surroundings of [GR], and the ability of [plaintiff] to continue to mother [GR]. I – I do not see it. They – they – a no contest plea, and these conditions of delayed sentence or diversion program, are neither proper cause nor change of circumstance. The motion is denied.

The trial court thus entered an order denying defendant's motion to change custody on December 18, 2015. This appeal followed.

II. STANDARD OF REVIEW

“Three different standards govern our review of a circuit court's decision in a child-custody dispute. We review findings of fact to determine if they are against the great weight of the evidence, we review discretionary decisions for an abuse of discretion, and we review question of law for clear error.” *Kubicki v Sharpe*, 306 Mich App 525, 538; 858 NW2d 57 (2014). “This Court reviews a trial court's determination regarding whether a party has demonstrated proper cause or a change of circumstances under the great weight of the evidence standard.” *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009). Under the great weight of the evidence standard, the trial court's findings are affirmed unless the evidence clearly preponderates in the opposite direction. *Mitchell v Mitchell*, 296 Mich App 513, 519; 823 NW2d 153 (2012). The trial court's credibility determinations are accorded deference give its superior position to make such determinations. *Shann v Shann*, 293 Mich App 302, 305; 809 NW2d 435 (2011). Clear legal error exists when the trial court errs in choosing, interpreting, or applying the law. *Sturgis v Sturgis*, 302 Mich App 706, 710; 840 NW2d 408 (2013).

III. ANALYSIS

Defendant argues¹ that the trial court erred when it made its threshold determination that proper cause or change of circumstances did not exist to warrant revisiting the issue of child custody. We disagree.²

Under the Child Custody Act, a custody order may be modified only if the moving party first establishes, by a preponderance of the evidence, proper cause or a change of circumstances. MCL 722.27(1)(c); *In re AP*, 283 Mich App 574, 600; 770 NW2d 403 (2009); *Corporan*, 282 Mich App at 603.

[T]o establish “proper cause” necessary to revisit a custody order, a movant must prove by a preponderance of the evidence the existence of an appropriate ground

¹ We note that defendant’s statement of question presented and much of his argument is based on a faulty premise. Defendant posits that the trial court prohibited the admission of plaintiff’s criminal charges and plea as evidence and refused to consider that evidence in making the threshold determination of whether proper cause or a change of circumstances existed. But the record plainly reflects that the trial court *did* consider the criminal charge, plea, and delayed sentence in making the threshold determination but concluded that this evidence did not demonstrate proper cause or a change of circumstances. Defendant has thus framed the issue incorrectly in his statement of question presented and throughout much of his appellate brief. By asking an incorrect question in his statement of questions presented, defendant has arguably waived the correct issue, i.e., whether the trial court’s determination that the criminal proceedings did not constitute proper cause or a change of circumstances was against the great weight of the evidence. See *River Investment Group, LLC v Casab*, 289 Mich App 353, 360; 797 NW2d 1 (2010) (“This issue is waived because plaintiff failed to state it in the statement of questions presented in its brief on appeal.”). Nonetheless, we will address the issue as an issue of law for which the record is factually sufficient, *VanBuren Twp v Garter Belt Inc*, 258 Mich App 594, 632; 673 NW2d 111 (2003), and because defendant’s brief makes arguments that could be understood to address the correct issue.

² We note that defendant did not file an appeal from the August 3, 2015 order denying his earlier motion to change custody. “When a final order is entered, a claim of appeal from that order must be timely filed. A party cannot wait until the entry of a subsequent final order to untimely appeal an earlier final order.” *Surman v Surman*, 277 Mich App 287, 294; 745 NW2d 802 (2007). If an order is a “final order” under MCR 7.202(6)(a)(iii) as “a post-judgment order affecting the custody of a minor,” and the appellant fails to file a timely claim of appeal from that order, the appellant’s challenges to the prior order in a later appeal are not properly before this Court, and this Court lacks jurisdiction to address those claims. *Id.* at 293-294. Although the grounds for the two motions are somewhat interrelated as both motions concerned plaintiff’s underlying conduct that allegedly occurred on September 20, 2014, the latter motion and defendant’s appeal are focused on the criminal proceedings related to that underlying incident, an issue that was not addressed in the earlier motion given the timing of the criminal proceedings. Our analysis is thus confined to the issues raised only in that latter motion.

for legal action to be taken by the trial court. The appropriate ground(s) should be relevant to at least one of the twelve statutory best interest factors, and must be of such magnitude to have a significant effect on the child's well-being. When a movant has demonstrated such proper cause, the trial court can then engage in a reevaluation of the statutory best interest factors. [*Vodvarka v Grasmeyer*, 259 Mich App 499, 512; 675 NW2d 847 (2003).]

[I]n order to establish a "change of circumstances," a movant must prove that, since the entry of the last custody order, the conditions surrounding custody of the child, which have or could have a *significant* effect on the child's well-being, have materially changed. Again, not just any change will suffice, for over time there will always be some changes in a child's environment, behavior, and well-being. Instead, the evidence must demonstrate something more than the normal life changes (both good and bad) that occur during the life of a child, and there must be at least some evidence that the material changes have had or will almost certainly have an effect on the child. This too will be a determination made on the basis of the facts of each case, with the relevance of the facts presented being gauged by the statutory best interest factors. [*Id.* at 513-514.]

In seeking to demonstrate a change of circumstances, a party cannot rely on facts that existed before the entry of the last custody order. *Id.* at 514. Proper cause *may* be established on the basis of facts that existed before the entry of the last custody order, but "a party would be hard-pressed to come to court after a custody order was entered and argue that an event of which they were aware (or could have been aware of) before the entry of the order is thereafter significant enough to constitute proper cause to revisit the order." *Id.*

In this case, the last custody order was entered on October 8, 2014 by consent of the parties. Defendant seeks to change custody on the basis of a third-degree child-abuse charge against plaintiff filed in 33rd District Court on July 31, 2015; plaintiff's no-contest plea to the misdemeanor offense of attempted third-degree child abuse on August 11, 2015; and the district court's imposition of probation and other conditions of diversion under MCL 771.1 on August 18, 2015. Although plaintiff's alleged assault on HM occurred before the entry of the October 8, 2014 custody order, defendant argues that the subsequent criminal proceedings were an escalation of the original circumstances, such that the trial court should have found that a change of circumstances or proper cause was shown. See *Dailey v Kloenhamer*, 291 Mich App 660, 666; 811 NW2d 501 (2011) (the trial court's finding of proper cause or a change of circumstances was not against the great weight of the evidence where "the parties' disagreements had escalated and expanded to topics that could have a significant effect on the child's well-being.").

The evidence does not clearly preponderate against the trial court's determination that defendant had failed to establish proper cause or a change of circumstances. The underlying altercation occurred before the entry of the last custody order. The testimony at the July 10, 2015 evidentiary hearing supported the trial court's finding that defendant knew about the altercation, and knew that there was an ongoing CPS investigation about it, *before* entry of the consent order. Defendant was in court when the consent order was signed, yet proceeded with his request that the court to enter the consent order. Although plaintiff was criminally charged,

pleaded no contest, and received a delayed sentence after the entry of the consent order, the trial court found that defendant had sufficient knowledge of the underlying events and investigation that he could have raised the issue at the October 8, 2014 hearing if he did not wish to proceed with the entry of the consent custody order pending the CPS investigation.³ The trial court also correctly noted that plaintiff did not receive jail time or other conditions of her delayed sentence that would affect her ability to parent GR, and that the district court indicated that the charge would be dismissed if plaintiff complied with that court's terms. The evidence did not clearly preponderate against the trial court's holding that defendant had failed to establish an appropriate ground to revisit custody and that defendant had failed to show a material change of conditions surrounding custody that could significantly affect GR's wellbeing. Thus, the trial court's determination that defendant failed to show proper cause or a change of circumstances was not against the great weight of the evidence.

Defendant argues that the trial court should have conducted an evidentiary hearing because the relevance of plaintiff's criminal charge and plea was in dispute. But the trial court is not necessarily required to conduct an evidentiary hearing on the threshold determination of proper cause or a change of circumstances. *Corporan*, 282 Mich App at 605. See also *Vodvarka*, 259 Mich App at 512 ("Often times, the facts alleged to constitute proper cause or a change of circumstances will be undisputed, or the court can accept as true the facts allegedly comprising proper cause or a change of circumstances, and then decide if they are legally sufficient to satisfy the standard."). Here, the trial court conducted an evidentiary hearing on defendant's earlier motion to change custody on the basis of the same underlying conduct relating to the September 20, 2014 incident. At that hearing, the parties presented evidence relevant to the determination of the instant motion, including regarding the extent of defendant's knowledge of the September 20, 2014 incident before entry of the October 8, 2014 consent custody order. Moreover, the facts surrounding the subsequent criminal charge, plea, and delayed sentencing were undisputed. Indeed, the trial court explicitly accepted the facts concerning the criminal proceedings as alleged by defendant, deemed those facts undisputed, and

³ Defendant knew before entry of the consent custody order that CPS was investigating the altercation and that, although there were two versions of what had occurred, the possibility that plaintiff had been the aggressor was being investigated by CPS. The trial court's finding that defendant had sufficient knowledge of the underlying incident to raise the issue at the October 8, 2014 hearing on the consent custody order is not against the great weight of the evidence. And defendant's opportunity to raise the issue at the October 8, 2014 hearing fundamentally distinguishes this case from *Vodvarka*, 259 Mich App at 515-516, in which proper cause was determined to exist because the prior custody order, which was not a stipulated order, was entered without the defendant's signature and without any type of hearing being held. This Court held in *Vodvarka* that "[a]lthough most of the evidence presented in defendant's petition existed before entry of the order and defendant was aware of those facts, the procedural circumstances deprived defendant of the opportunity to inform the court of these facts." *Id.* at 516. In this case, by contrast, defendant could have raised the issue of the underlying incident and the ongoing CPS investigation at the October 8, 2014 hearing on the consent custody order, but failed to do so.

then found that those facts were insufficient to satisfy the threshold standard. Hence, defendant's argument that he is entitled to another evidentiary hearing is without merit.

We also find unconvincing and inapposite in this case defendant's unpreserved⁴ argument that this Court should apply the doctrine of anticipatory neglect from the termination of parental rights context. See *In re Gazella*, 264 Mich App 668, 680-681; 692 NW2d 708 (2005) ("A child may come within the jurisdiction of the court solely on the basis of a parent's treatment of another child. Abuse or neglect of the second child is not a prerequisite for jurisdiction of that child and application of the doctrine of anticipatory neglect."), superseded in part by statute on other grounds as stated in *In re Hansen*, 285 Mich App 158 (2009), vacated on other grounds 486 Mich 1037 (2010). The trial court was aware of the allegations surrounding the September 20, 2014 incident, and in denying defendant's motion did not find plaintiff's treatment of HM to be irrelevant or inadmissible in a child-custody case pertaining to GR. Rather, as discussed, the trial court considered the evidence regarding the alleged assault, defendant's knowledge of the event, and the related criminal proceedings, and concluded that defendant had failed to satisfy the threshold standard applicable to a motion to change custody. Whether the anticipatory neglect doctrine or some equivalent legal principle is or should be applicable in child-custody cases is simply not implicated here.

Defendant vaguely alludes to other alleged inappropriate conduct on the part of plaintiff, including that she failed to require GR to wear a helmet on an ATV and delayed GR's medical care by arriving late with GR for a scheduled surgery. Defendant cites no record evidence to support these claims; instead, defendant merely cites to the transcript of the November 4, 2015 motion hearing, at which defendant's counsel asserted that plaintiff had engaged in this conduct. "Counsel's arguments are not evidence." *Zantop Int'l Airlines, Inc v Eastern Airlines*, 200 Mich App 344, 364; 503 NW2d 915 (1993). There is no indication that the trial court prevented defendant from presenting evidence on these matters, and defendant does not explain why he has identified no evidence in support of his contention. A party may not merely announce a position or assert an error and leave it to this Court to discover and rationalize the basis for his claims or to elaborate the party's argument for him. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). This Court will not search the record for factual support for a party's claims. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 388; 689 NW2d 145 (2004). In any event, we find no evidentiary support in the record for defendant's claims regarding this alleged behavior by plaintiff, and defendant did not seek to revisit these points at the motion hearing held on December 16, 2015.

Finally, defendant notes that the Friend of the Court (FOC) initially recommended that the trial court grant defendant's motion, that the trial court stated at the November 4, 2015 hearing that it found no change of circumstances despite the FOC's recommendation, and that the FOC later changed its recommendation to a proposed finding of no change of circumstances. Defendant fails to explain the significance of the FOC's recommendations, and the trial court's

⁴ Unpreserved issues are reviewed for plain error affecting substantial rights. *In re Smith Trust*, 274 Mich App 283, 285; 731 NW2d 810 (2007), *aff'd* 480 Mich 19 (2008).

determination not to follow the initial FOC recommendation does not constitute error. Defendant acknowledges that after a moving party has made the threshold showing of proper cause or a change of circumstances by a preponderance of the evidence, the trial court must independently determine the best interests of the child; that is, an FOC recommendation cannot be used by the parties to waive the trial court's independent authority to determine the child's best interests under the Child Custody Act. See *Harvey v Harvey*, 470 Mich 186, 193-194; 680 NW2d 835 (2004). The fact that the trial court did not follow the FOC's initial recommendation and that the FOC later changed its recommendation does not establish that the trial court failed to exercise its duty to independently decide the case. The trial court correctly determined that defendant did not satisfy the threshold standard applicable to his motion to change custody, and the court thus properly did not revisit the custody determination and did not make a new best-interest determination. See *Corporan*, 282 Mich App at 603-604. Defendant suggests that the trial court barred the admission of evidence that the FOC considered, but the record reflects that this is not so; the trial court in fact considered the evidence of the criminal proceedings but concluded that defendant had failed to establish proper cause or a change of circumstances by a preponderance of the evidence.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Mark T. Boonstra